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IN THE

Supreme Court of the United States

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE, AND JUDGE LYNDA L. HEATHSCOTT,
Petitioners,

JUDGE DENNIS C. KOLENDA,
Respondent,

v.

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND MICHAEL D. VOGLER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENTS

STEVEN D. BENJAMIN
Co-Chair, Indigent Defense Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
BENJAMIN & DESPORTES, P.C.
P.O. Box 2464
Richmond, VA 23218
(804) 788-4444

Counsel for National Association of Criminal Defense Lawyers

PAUL M. RASHKIND
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
150 West Flagler St., Suite 1500
Miami, FL 33130
(305) 536-6900

Counsel for National Association of Federal Defenders

CRAIG A. STEWART
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022
(212) 715-1000

ANTHONY J. FRANZE *
SHEILA B. SCHEUERMAN
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

Counsel for National Association of Criminal Defense Lawyers

* Counsel of Record

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. INDIGENT DEFENDANTS LACK THE EDUCATION AND LITERACY SKILLS TO MEANINGFULLY REPRESENT THEMSELVES ON FIRST APPEAL	4
A. Profile of an Indigent Appellant: An Incarcerated High School Dropout Lacking Even Basic Literacy Skills	5
B. Portrait of an Appeal Following a Guilty Plea: Complicated Sentencing Errors and Procedural Pitfalls	8
C. The "Protections" Provided Under Michigan's Scheme Are No Substitute for Counsel	15
II. THE COMPLEXITY OF APPEAL AND INDIGENT DEFENDANTS' CHARACTERISTICS REQUIRE THIRD-PARTY STANDING TO PROTECT INDIGENTS' CONSTITUTIONAL RIGHT TO COUNSEL	17
A. The Procedural Hazards of Federal Habeas Corpus	18
B. Meeting Substantive Habeas Corpus Criteria	21

TABLE OF CONTENTS—Continued

	Page
III. MICHIGAN'S DEPRIVATION OF COUNSEL TO INDIGENT APPELLANTS VIOLATES CONSTITUTIONAL PRINCIPLES INDEPENDENT FROM THOSE UNDERLYING *DOUGLAS*	22
A. Michigan's First Appeal Is a "Critical Stage" Requiring Counsel Under *Gideon*	23
B. Michigan's Scheme Unconstitutionally Abrogates a Traditional, Firmly Rooted Practice of Providing Indigents Counsel In Their First Appeal On the Merits	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Abela v. Gen. Motors Corp., 677 N.W.2d 325 (Mich. 2004)	22
Anders v. California, 386 U.S. 738 (1967)	28
Argersinger v. Hamlin, 407 U.S. 25 (1972)	5
Baldwin v. Reese, 124 S. Ct. 1347 (2004)	19
Bell v. Cone, 535 U.S. 685 (2002)	23
Brecht v. Abrahamson, 507 U.S. 619 (1993)	26
Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987)	30
Coleman v. Thompson, 501 U.S. 722 (1991)	19-20
Cooper v. Oklahoma, 517 U.S. 348 (1996)	29-30
Dickerson v. United States, 530 U.S. 428 (2000)	30
Douglas v. California, 372 U.S. 353 (1963)	*passim*
Evitts v. Lucey, 469 U.S. 387 (1985)	*passim*
Gardner v. Florida, 430 U.S. 349 (1977)	24
Gideon v. Wainwright, 372 U.S. 335 (1963)	*passim*
Hafley v. Sowders, 902 F.2d 480 (6th Cir. 1990)	19
Hamilton v. Alabama, 368 U.S. 52 (1961)	24-25

TABLE OF AUTHORITIES—Continued

	Page
Iowa v. Tovar, 124 S. Ct. 1379 (2004)	23
Johnson v. Zerbst, 304 U.S. 458 (1938)	5
Martinez v. Court of Appeal of Cal., 528 U.S. 152 (2000)	27
Mata v. Egeler, 383 F. Supp. 1091 (E.D. Mich. 1974)	30
Medina v. California, 505 U.S. 437 (1992)	29
Mempa v. Rhay, 389 U.S. 128 (1967)	4, 23-26
Miller v. Albright, 523 U.S. 420 (1998)	17, 22
O'Sullivan v. Boerckel, 526 U.S. 838 (1999)	13
Pennsylvania v. Finley, 481 U.S. 551 (1987)	20
Penson v. Ohio, 488 U.S. 75 (1988)	16, 24, 27-28
People v. Babcock, 666 N.W.2d 231 (Mich. 2003)	12
People v. Bulger, 614 N.W.2d 103 (Mich. 2000)	*passim*
People v. Knolton, No. 237796, 2003 WL 1343001 (Mich. Ct. App. Mar. 11, 2003)	10-11
People v. Nixten, 454 N.W.2d 160 (Mich. Ct. App. 1990)	10
People v. Plaza, 617 N.W.2d 687 (Mich. 2000)	10-11, 25
People v. Stauffer, 640 N.W.2d 869 (Mich. 2003)	12

TABLE OF AUTHORITIES—Continued

	Page
Powell v. Alabama, 287 U.S. 45 (1932)	5
Roe v. Flores-Ortega, 528 U.S. 470 (2000)	24
Rose v. Lundy, 455 U.S. 509 (1982)	20
Ross v. Moffitt, 417 U.S. 600 (1974)	22, 26-27
Singleton v. Wulff, 428 U.S. 106 (1976)	17
Smith v. Robbins, 528 U.S. 259 (2000)	28-29
Swenson v. Bosler, 386 U.S. 258 (1967)	15-16
Tollett v. Henderson, 411 U.S. 258 (1973)	11
United States v. Ash, 413 U.S. 300 (1973)	4, 24, 26, 28
United States v. Gonczy, 357 F.3d 50 (1st Cir. 2004)	10
United States v. Wade, 388 U.S. 218 (1967)	24, 28
Williams v. Taylor, 529 U.S. 362 (2000)	21
Yarborough v. Alvarado, No. 02-1684, 2004 WL 1190042 (U.S. June 1, 2004)	21
Yniguez v. Arizona, 939 F.2d 727 (9th Cir. 1991)	22

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

	Page
28 U.S.C. § 2254 (2004)	18-19, 21
Mich. Comp. L. (MCL) § 600.321(1)(a) (2003)	14
MCL § 769.34 (2004)	11
MCL § 770.3a (2000)	*passim*
MCL §§ 777.31-777.69 (2004)	11
Mich. Ct. R. (MCR) 2.002	14
MCR 2.113(B)	14
MCR 6.302	10
MCR 6.425	10-11, 14
MCR 6.502	18
MCR 6.508	18
MCR 6.509	19
MCR 7.205	10-14, 19
MCR 7.212(C)	13-14

STUDIES, ARTICLES, AND OTHER MATERIALS

	Page
Donna Bellorado et al., U.S. Dep't of Justice, *Making Literacy Programs Work: A Practical Guide for Correctional Educators* (1986)	7
Bureau of Justice Statistics, U.S. Dep't of Justice, *Additional Corrections Facts at a Glance*, *at* http//www.ojp.usdoj.gov/bjs/gcorpop.htm (last modified May 28, 2004)	6
Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127 (1995)	9
Sheila Robertson Deming, *Michigan's Sentencing Guidelines*, 79 Mich. Bar. J. Online 6 (2000), *available at* http://www.michbar.org/journal/article.cfm?articleID=92&volumeID=8&viewType=archive	12

TABLE OF AUTHORITIES—Continued

	Page
Examining the Work of the State Courts, 2002: A National Perspective from the Court Statistics Project 61 (Brian J. Ostrom et al. eds., 2003), *available at* http://www.ncsconline.org/D_Research/csp/2002_Files/2002_criminal.pdf	6
Guilty Pleas, 91 Geo. L.J. 362 (2003)	10
Roger A. Hanson & Henry W. K. Daley, U.S. Dep't of Justice, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf	18, 20-21
Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431 (1996)	9
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Mich. Dep't of Corrections, *2002 Annual Report*, *available at* http://www.state.mi.us/mdoc/jobs/pdfs/2002annualReport2.pdf (last visited June 1, 2004)	6
Mich. Dep't of Corrections, *2001 Statistical Report*, *available at* www.michigan.gov/documents/2001Stat_79881_7.pdf (last visited June 1, 2004)	7
Michigan Form Motion for Post-Conviction Proceedings, *at* http://courts.michigan.gov/scao.courtforms/felonycriminal/cc257a.pdf (last visited June 1, 2004)	19

TABLE OF AUTHORITIES—Continued

	Page
Michigan Form Application for Appeal, *available at* http://www.michigan.gov/scao/courtforms/appeals/cc405.pdf (last visited June 1, 2004)	14
Mich. Literacy, Inc., *Fact Sheet: Correctional Education*, *at* http://www.michiganliteracy.org/corred.htm (last visited June 1, 2004)	8
Mich. Sentencing Guidelines Manual (2003)	12
National Center for State Courts, *Understanding Reversible Error in Criminal Appeals* (1989)	8-9
Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U. L. Rev. 1441 (1997)	9
U.S. Dep't of Educ., *Literacy Behind Prison Walls* (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf	7-8, 11-12, 15
Caroline Wolf Harlow, U.S. Dep't of Justice, *Defense Counsel in Criminal Cases* (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf	6
Caroline Wolf Harlow, U.S. Dep't of Justice, *Education and Correctional Populations* (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf	6-7

INTEREST OF *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has 10,000 members nationwide—joined by 82 state and local affiliate organizations with another 28,000 members—including private criminal defense lawyers, public defenders, and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly issues affecting indigent defendants.

In this case, NACDL and NAFD are concerned about Michigan Compiled Laws § 770.3a's denial of appellate counsel to indigent defendants who enter guilty pleas, leaving

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than NACDL, NAFD, and their counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioners and Respondents have consented to the filing of this brief, and pursuant to Rule 37.3(a), NACDL and NAFD have filed the letters of consent with the Clerk of the Court.

these defendants—most of whom are functionally illiterate—to identify and brief complicated sentencing and other errors in their first and only appeal on the merits.

SUMMARY OF ARGUMENT

I. It is remarkable that forty years after this Court's landmark decisions in *Gideon v. Wainwright* and *Douglas v. California*, a State would seek to deprive counsel to the poor at a critical stage in the criminal justice process. Petitioners defend Michigan Compiled Laws (MCL) § 770.3a (2000) largely on the grounds that appeals following guilty pleas are "simpler" matters and therefore indigent defendants can adequately protect their own rights on first appeal. Pet'rs Br. at 32 (citation omitted). That position ignores both the abilities of indigent appellants and the real world complexity of guilty plea appeals.

Indigent defendants who plead guilty are the poorest, least educated, least literate members of our society. National literacy studies show that these defendants, most of whom will be incarcerated, lack the skills necessary to write a note disputing an improper charge on a credit card bill, much less meet the substantive and procedural requirements of filing and prosecuting an appeal. Moreover, while involving fewer issues than appeals after trial, appeals following guilty pleas are equally complex. Guilty plea appeals typically involve errors under the notoriously difficult Michigan Sentencing Guidelines and are subject to unforgiving procedural requirements under the Michigan Court Rules (MCR). Reflecting the complexity of the issues—and contrary to the myth that most appeals following guilty pleas are "frivolous," *see* Judge Kolenda Br. at 16—the success rate of these appeals is relatively high. Indeed, as reflected below, an examination of a typical indigent appeal in Michigan confirms, "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). All the more so to the poor, functionally illiterate defendants targeted by MCL § 770.3a.

II. The same barriers that render an indigent defendant's *pro se* direct appeal meaningless likewise necessitate the protection of their right to counsel through third-party standing. While Respondents clearly demonstrate that third-party standing does not demand a showing that it is *impossible* for indigent defendants in Michigan to assert their own rights, even an "impossibility" standard is met in the unique circumstances here. This case is unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting their right to counsel.

Further, the situation is atypical because—given the Michigan Supreme Court's deci-sion upholding the practice of depriving appellate counsel to indigent defendants who plead guilty—poor defendants must turn to federal habeas corpus review as the principal means to protect their constitutional rights. Only 1% of federal habeas corpus petitions are granted on the merits. And those peti-tioners had the right to counsel on first appeal to help identify and brief the issues subject to habeas relief. While there might somewhere be one of those rare individuals—like Clarence Earl Gideon—who defies the odds and overcomes the seemingly impossible obstacles to presenting a claim *pro se*, the hard reality of the system is that the poor, under-educated, illiterate defendants denied counsel under MCL § 770.3a have little to no hope of protecting their own rights.

III. Finally, as Respondents aptly have illustrated, Michigan's system falls squarely under *Douglas*, and the deprivation of counsel to indigent defendants pursuant to MCL § 770.3a violates both due process and equal protection. But this case transcends the constitutional principles underlying *Douglas*. Michigan's appeal for indigents who plead guilty constitutes a "critical stage" of criminal proceedings covered by the Sixth Amendment's right to counsel under *Gideon*. To

be sure, this Court has never had need to address whether an initial guilty-plea appeal like Michigan's constitutes a "critical stage." But in post-trial proceedings where identical interests are at stake, such as sentencing, this Court has held that counsel is required under the Sixth Amendment. *Mempa v. Rhay*, 389 U.S. 128, 135-36 (1967). And this Court has noted that *Gideon*'s right to counsel in critical stages should apply "when new contexts appear presenting the same dangers that gave birth initially to the right [to counsel] itself." *United States v. Ash*, 413 U.S. 300, 311 (1973). Michigan's initial appeal for those who plead guilty is exactly that. Accordingly, even if Petitioners were correct that Michigan's unprecedented new appellate system for indigents who plead guilty falls through the cracks of *Douglas* (which it does not), the Michigan system runs afoul of the Sixth Amendment.

In sum, Michigan's system under MCL § 770.3a is so fundamentally flawed—so contrary to the principles underlying the right to counsel—that unconstitutionality permeates the entire scheme. This Court should affirm the Sixth Circuit's decision striking down the system as unconstitutional.

ARGUMENT

I. INDIGENT DEFENDANTS LACK THE EDUCATION AND LITERACY SKILLS TO MEANINGFULLY REPRESENT THEMSELVES ON FIRST APPEAL

Petitioners' defense of MCL § 770.3a's deprivation of appellate counsel to indigent defendants rests largely on one central premise: guilty plea appeals are "simpler" and thus "defendants who plead guilty have an adequate opportunity to present their claims fairly and receive a meaningful appeal."

Pet'rs Br. at 32, 35; *accord id.* at 30-37.[2] Petitioners ignore the capabilities of indigent appellants, downplay the complexity of appeals following guilty pleas, and minimize the vital interests at stake.

A. Profile of an Indigent Appellant: An Incarcerated High School Dropout Lacking Even Basic Literacy Skills

This Court long has recognized the inability of laymen to represent themselves effectively at critical stages in the criminal justice process, including a defendant's first appeal as of right. *E.g.*, *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (quoting same); *accord Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (noting "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself"); *Argersinger v. Hamlin*, 407 U.S. 25, 32 n.3 (1972) ("That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious.") (citation omitted); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."). Michigan's MCL § 770.3a, however, does not target the

[2] MCL § 770.3a applies to defendants who plead guilty, guilty but mentally ill, or *nolo contendere*, *id.* § 770.3a(1), and effectively codifies the former practice of some Michigan state court judges who denied appointed counsel to indigents who sought to appeal plea-based convictions. For convenience, this brief will refer only to "guilty pleas," though our discussion will apply to all three types of convictions covered by MCL § 770.3a. Further, while focusing principally on MCL § 770.3a, our discussion applies to both the statute and the practice of denying appointed counsel to indigents attempting to appeal plea-based convictions.

average layman. It denies counsel to indigent defendants who plead guilty. As a group, these individuals are the poorest, least educated, and least literate members of our society.

According to Justice Department statistics, about 80% of state felony defendants use court-appointed lawyers. Caroline Wolf Harlow, U.S. Dep't of Justice, *Defense Counsel in Criminal Cases* 1, 5 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (analyzing data on felony defendants in state courts in 75 largest counties). The typical indigent defendant—like the indigent Respondents in this case—pleads guilty and is incarcerated. *See id.* at 6, tbls. 10-11 (71% of indigent defendants plead guilty and 71.3% of convicted indigent defendants are incarcerated); *see also Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* 61 (Brian J. Ostrom et al. eds., 2003), *available at* http://www.ncsconline.org/D_Research/csp/2002_Files/2002_criminal.pdf (in Michigan during 2001, only 4.5% of criminal cases were tried, 62.7% cases were disposed of by guilty pleas, 32.8% otherwise disposed of).

The incarcerated indigent, like the rest of the inmate population, is more likely to be young, male, and a member of a minority group. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Additional Corrections Facts at a Glance*, *at* http://www.ojp.usdoj.gov/bjs/gcorpop.htm (last modified May 28, 2004); *accord* Mich. Dep't of Corrections, *2002 Annual Report* 21, *available at* http://www.state.mi.us/mdoc/jobs/pdfs/2002annualReport2.pdf (last visited June 1, 2004) (average age of Michigan state male prisoner in 2002 was 35 years old; 57.7% of prison population were members of minority groups). Odds are, like 68% of the prison population, he is a high school dropout or received no high school education at all. *See* Caroline Wolf Harlow, U.S.

Dep't of Justice, *Education and Correctional Populations* 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf.[3] He likely functions at two to three grade levels below the level actually completed in school. *See* Donna Bellorado et al., U.S. Dep't of Justice, *Making Literacy Programs Work: A Practical Guide for Correctional Educators* 2 (1986).

What is more, there is an extraordinarily high probability that he is functionally illiterate. *See generally* U.S. Dep't of Educ., *Literacy Behind Prison Walls* (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf [hereinafter Literacy Report].[4] This means that while the indigent defendant may

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[3] This report analyzed data showing that 68% of inmates in state prisons have not completed high school, compared to 18% of the general population. *Education and Correctional Populations*, *supra*, at 1. The report also found that 14.2% of state inmates had an eighth-grade education or less. *Id.* at 2, tbl. 1; *cf.* Mich. Dep't of Corrections, *2001 Statistical Report* F-9-F-11, (reflecting that most participants in Michigan correctional educational services are enrolled in programs that teach Adult Basic Education (0 to 8th grade)), *available at* www.michigan.gov/documents/2001Stat_79881_7.pdf (last visited June 1, 2004).

[4] The Literacy Report, by the National Center for Education Statistics, determined that 7 out of 10 inmates are functionally illiterate. *See* Literacy Report, *supra*, at xviii, 10, 17. Specifically, relving on data from the National Literacy Survey, the report evaluated the abilities of the nation's inmate population in three areas of literacy: prose, document, and quantitative literacy. *Id.* at 15-16. Participants were rated on a scale of 1 to 5 on their capabilities within each of these three categories. *Id.* at 9 & fig. 1. The study showed that approximately 70% of inmates fell into the two lowest levels (Levels 1 and 2) for each literacy category. *Id.* at 17. Approximately one-third of inmates, for instance, scored at only Level 1 in all categories. *Id.* at 20. Many of these inmates lack basic skills such as the ability to locate the time of a meeting on a form. *Id.* at 10, 17. All lack the ability to perform only moderately more difficult tasks, such as locating an intersection on a street map. *Id.* The Literacy Report found that the average proficiency level for all inmates was Level 2, the second-to-bottom level for each literacy category. *Id.* at 19, tbl. 2.3. Thus, the "average" inmate, the report explains, lacks the ability to

have some minimal reading and writing abilities, he cannot perform a wide range of routine tasks. According to the leading federally-funded literacy study, for instance, he likely lacks the ability to:

- enter information on an application for a social security card; *id.* at 10, 17,
- use a bus schedule; *id.* at 10, 17,
- write a letter explaining an error on a credit card bill; *id.* at 10, 17,
- determine the difference in price between two tickets; *id.* at 10, 17, and
- identify information in a bar graph.

Id. at 10, 17; *see also* Michigan Literacy, Inc., *Fact Sheet: Correctional Education, at* http://www.michiganliteracy.org/corred.htm (last visited June 1, 2004).

In many ways, the typical indigent appellant is the picture of Respondent Charles Carter: a poor, black, special education student whose schooling ended at the tenth grade. *See* J.A. 28a. It is these individuals whom Petitioners claim can meaningfully represent themselves on their first and only appeal on the merits following their pleas. That position, particularly when considered in light of Michigan's complex sentencing laws and appellate procedures, defies reality.

B. Portrait of an Appeal Following a Guilty Plea: Complicated Sentencing Errors and Procedural Pitfalls

Although more limited in scope, appeals following guilty pleas are no less complex than other appeals. In the era of determinate sentencing guidelines, sentencing issues are increasingly common on appeal. *See* National Center for

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perform such tasks as writing a brief letter to explain an error on a bill or using a bus schedule. *Id.* at 10, 17. Conversely, fewer than 1% of inmates performed at the top of the literacy scale. *Id.* at 19-20.

State Courts, *Understanding Reversible Error in Criminal Appeals* 18-19 (1989) (study of appeals in five state appellate courts finding high rate of sentencing issues on appeal); Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 438-39 (1996) (discussing report that found that the majority of appeals following a guilty plea in Michigan involve sentencing issues).[5] Sentencing guidelines, like Michigan's, "are often so bewilderingly complex as to virtually guarantee appellate issues in a high percentage of sentencing decisions." *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 184 (1995).

Reflecting the complexity of the issues—and contrary to the myth that most appeals following guilty pleas are "frivolous," *see* Judge Kolenda Br. at 16—the success rate of these appeals is relatively high. *See* Matuszak, *supra*, at 440-41, 443.[6] By some accounts, anywhere from 12% to 47% of Michigan appeals following guilty pleas result in some form of relief. *Id.* at 443 (discussing studies by the Michigan State Appellate Defender's Office and the Michigan Appellate Assigned Counsel System (MAACS)). MAACS estimated that errors in criminal appeals in 1990 resulted in cumulative sentence reductions of 1,220.4 years. *Id.* at 441.

Thus, an effective system for first appeals provides a vital check on criminal justice proceedings, particularly the integrity of the plea and sentencing process. Michigan's scheme leaves this safeguard largely in the hands of unrepresented indigents on the premise that they can fend for

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[5] *Cf.* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U. L. Rev. 1441, 1491 (1997) (65% of federal criminal appeals in 1994-95 involved sentencing issues).

[6] *See also* Calhoun, *supra*, at 190-91 (discussing success rates of criminal appeals and 1992-93 study of two appellate courts which found that 24% of appeals after plea received some form of relief).

themselves. A brief review of what that means, however, shatters this notion.

1. *Finding and Arguing a Point of Error*

In Michigan, the indigent defendant who pleads guilty has only twenty-one days to file a timely "Application for Leave to Appeal," which identifies and argues all points of error. MCR 7.205(A). Issues not raised by the indigent defendant are waived. MCR 7.205(D)(4). On his own, therefore, the indigent defendant quickly will have to analyze an array of potential errors, including: What issues were lost as the result of the plea?[7] Did the government explicitly or implicitly violate the plea agreement?[8] Did the judge meet all statutory and procedural requirements to ensure the plea was voluntary?[9] Were there any scoring or other errors under the Michigan Sentencing Guidelines?[10] Did the State fulfill its obligations in providing a transcript or other materials required by law?[11] And did counsel provide effective

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[7] *See, e.g., Guilty Pleas*, 91 Geo. L.J. 362, 372-79 (2003) (reviewing rights retained and lost as result of guilty plea); *see also People v. Bulger*, 614 N.W.2d 103, 133-34 (Mich. 2000) (Cavanagh, J., dissenting) (discussing errors that survive guilty plea in Michigan).

[8] *See, e.g., People v. Nixten*, 454 N.W.2d 160 (Mich. Ct. App. 1990) (finding error where government explicitly failed to fulfill agreed sentence recommendation); *United States v. Gonczy*, 357 F.3d 50, 53-54 (1st Cir. 2004) (finding error where government implicitly failed to fulfill agreed sentence recommendation by making statements undercutting recommended sentence).

[9] *See* MCR 6.302(B) (providing information court must give defendant who pleads guilty); MCR 6.425(B)-(E) (providing information court must give defendant at sentencing).

[10] *See, e.g., People v. Knolton*, No. 237796, 2003 WL 1343001, at *4 n.28 (Mich. Ct. App. Mar. 11, 2003) (remanding for resentencing for guidelines error).

[11] *See People v. Plaza*, 617 N.W.2d 687, 688 (Mich. 2000) (Kelly, J., dissenting) (noting that court should have remanded because indigent was denied transcript); *see id.* at 687 (Corrigan, J., concurring) (noting that remand unnecessary because indigent failed to raise transcript issue in *pro se* application for appeal).

assistance in the plea process, such as objecting to sentencing errors?[12] This task must be accomplished in less than a month by an individual who typically cannot "[l]ocate two features of information in [a] sports article." *See* Literacy Report, *supra*, at 10 (identifying abilities of individuals in prose literacy Level 2). Simply determining whether a sentencing error exists would give most lawyers pause. To identify such an error, an indigent defendant would have to wander alone [13] through Michigan's comprehensive statutory scheme, which includes nearly fifty provisions identifying Offense Variables, MCL §§ 777.31 to 777.49a (2004), Prior Record Variables, MCL §§ 777.50 to 777.57 (2004), and multiple sentencing grids. MCL §§ 777.61-777.69 (2004). He also would have to make sure to use the guidelines in effect at the time of his offense. *See* MCL § 769.34(2) (2004). This task will not be easy given the frequent changes

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[12] *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973) (plea does not foreclose ineffective assistance of counsel claims).

[13] While MCL § 770.3a provides an indigent defendant with appellate counsel when a sentence exceeds the guideline range, it does not require counsel for other errors, such as an "error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL § 769.34(10); *see also* MCL § 770.3a(2)(b) (requiring counsel where sentence exceeds guidelines range); *id.* § 770.3a(3) (permitting but not requiring appointment of counsel for some sentencing errors). If the sentence exceeds the guidelines range, the court must advise the defendant that he is entitled to court appointed counsel. MCR 6.425(E)(2)(b)(i). The court also must state the reasons for the departure on the record, MCL § 769.34(3), and advise the defendant orally and in writing that he may appeal the sentence on the basis of the departure. *See* MCR 6.425(E)(4). That process assumes, however, that the court itself is aware that the sentence exceeded the guidelines, which is not always the case given the complexity of the system. *See People v. Knolton*, 2003 WL 1343001, at *4 n.28 (remanding for resentencing when trial court failed to realize that sentence was outside guidelines range and thus failed to follow procedures for guidelines departures).

to Michigan's sentencing laws. *See* Sheila Robertson Deming, *Michigan's Sentencing Guidelines*, 79 Mich. Bar J. Online 6 (2000) (noting legislative amendments to guidelines in ten different 1999 public acts with five different effective dates), *available at* http://www.michbar.org/journal/article.cfm?articleID=92&volumeID=8&viewType=archive; *see also People v. Babcock*, 666 N.W.2d 231, 253-56 (Mich. 2003) (providing background of Michigan's replacement of judicial sentencing guidelines with statutory guidelines).

To help tackle the difficult statutory scheme, the indigent defendant may turn to the State Court Administrative Office's "Guidelines Manual." *See* Mich. Sentencing Guidelines Manual (2003). That the "user friendly" guide is over one hundred pages long, contains some eighteen different grids, three pages of definitions, and eight pages of instructions, *see id.*, reflects the daunting task facing a lawyer reviewing the propriety of a sentence, let alone someone who typically cannot understand a bar graph or solve basic math problems. *See* Literacy Report, *supra*, at 10 (identifying abilities of individuals in document literacy Levels 2 and 3 and quantitative literacy Level 3).

After making his way through the Manual, the indigent defendant would have to research judicial interpretations of the guidelines. Only last year, the Michigan Supreme Court had to clarify "unfamiliar or confusing" guideline requirements, *People v. Stauffer*, 640 N.W.2d 869, 871 (Mich. 2003), and even included a twelve paragraph appendix to one of its decisions to aid practitioners on Michigan's intricate sentencing procedures. *Babcock*, 666 N.W.2d at 244-45.

Assuming, however, that the indigent defendant could in fact identify an error in sentencing—to say nothing of the

other potential errors hidden from the untrained eye[14]—he would then face his next hurdle: articulating the error in writing and meeting all Michigan appellate procedural requirements.

2. *Complying With Michigan's Appellate Rules*

The right to counsel on the first merits appeal is important not only to identify and present the substantive legal grounds, but also for "a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and for the defendant to obtain a decision at all—much less a favorable decision—on the merits of the case." *Evitts*, 469 U.S. at 394 n.6. Like most states, Michigan's appellate procedures are complex. The procedures for appeals following guilty pleas are no exception. Under MCR 7.205, the indigent defendant's so-called "Application" for appeal must be filed within twenty-one days from entry of the judgment, MCR 7.205(A), though the court may accept an untimely filing up to one year after judgment. *See* MCR 7.205(F)(1)-(4). Any issue not raised in the Application is forever waived, both in state court actions, MCR 7.205(D)(4), and in subsequent federal habeas corpus proceedings. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

To meet the filing requirements, the indigent defendant must submit five copies of his Application, "stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; [and] setting forth a concise argument, conforming to MCR 7.212(C) . . . ." MCR 7.205(B)(1). MCR 7.212(C), in turn, sets forth the required contents of appellate briefs. Specifically, the indigent's appeal from a plea-based

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[14] *See Bulger*, 614 N.W.2d at 134-35 (Cavanagh, J., dissenting) (providing samples of actual Michigan guilty plea appeals reflecting complex issues in addition to sentencing).

conviction must, using the specific format required under the rule, include a statement of jurisdiction, the standard of review, record citations, the relevant statutes or constitutional provisions, a statement of the issues, and a legal argument. MCR 7.212(C)(4)-(7). All of this must be submitted in English. MCR 2.113(B).

The indigent defendant also must obtain and file multiple copies of several documents, including the judgment, docket entries, and certain transcripts, *see* MCR 7.205(B), and must either tender a $375 filing fee or submit a motion to waive fees and an affidavit of indigency. *See* MCL § 600.321(1)(a) (2003); MCR 2.002.

Unlike defendants with financial resources, most indigent defendants who plead guilty will not have a lawyer-like Application and supporting brief. Nor will they have counsel's insights regarding the issues that should be raised and the risks of not raising a particular issue. Instead, Michigan law provides defendants who plead guilty a three-page form Application created by the State Court Administrative Office. MCR 6.425(E)(2)(d); *see* Pet. App. 160a-170a (sample application form).[15]

Perhaps recognizing that few unrepresented indigents will meet the twenty-one day filing deadline, the form begins with a "Statement of Delay" section for the defendant to explain why the filing is untimely. *See* Pet. App. 160a. The form also requires entry of information such as "Charge Codes, MCL citation/PACC Code," Pet. App. 166a, and includes a detailed instruction sheet concerning all of the documents needed to accompany the filing. Pet. App. 160a-164a. Although following these directions might not pose a major challenge for a college graduate, the average indigent inmate has very low "document literacy" skills, and typically cannot

[15] The current version of the form is available at http://courts.michigan.gov/scao/courtforms/appeals/cc405.pdf (last visited June 1, 2004).

complete an application for a social security card or enter information on an automobile maintenance record form. Literacy Report, *supra*, at 10, 17.

Aside from these procedural formalities, the form requires the indigent defendant to set forth each of the following: the questions presented for appeal, the statement of the facts, the arguments, and the relief requested. Pet. App. 169a-170a. With regard to the legal argument section, the indigent defendant is advised to "state the law that supports your position and explain how the law applies to the facts of your case." Pet. App. 170a. That is the extent of guidance the indigent defendant is provided on making his case for appeal.

C. The "Protections" Provided Under Michigan's Scheme Are No Substitute for Counsel

Petitioners claim that a poor defendant will be able to overcome the obstacles above because he "will have substantial materials available that are sufficient to permit him to present his claims fairly and thus receive a meaningful appeal." Pet'rs Br. at 35; *see also* Judge Kolenda Br. at 23-24. Those materials, however, are scarcely better than no guidance at all.

Petitioners first stress that indigent defendants receive free transcripts and possess postconviction motions and other materials prepared by trial counsel. Pet'rs Br. at 35-36. This Court previously has recognized that such materials are no substitute for having a lawyer cull the record, identify errors, and craft an appellate brief. *See Swenson v. Bosler*, 386 U.S. 258 (1967) (per curiam). In *Swenson*, Missouri argued that no counsel was necessary to indigents on first appeal of right because trial counsel had filed a "motion for new trial which specifically designated the issues which could be considered on direct appeal" and the State provided the indigent defendant a free transcript. *Id.* at 259. This Court rejected the argument, concluding that "[t]he assistance of appellate counsel in preparing and submitting a brief to the appellate

court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript" are benefits that cannot be denied to a defendant simply because he is poor. *Id.*; *see also Evitts*, 469 U.S. at 394 (citing *Swenson* for importance of preparation of brief by attorney in first appeal of right). In any case, the reality is that counsel in most cases will not produce written post-conviction motions, and in any event, such motions likely will not adequately address appellate issues. *See People v. Bulger*, 614 N.W.2d 103, 139-40 (Mich. 2000) (Cavanagh, J., dissenting) (discussing why motions are inadequate substitutes for an appellate brief).

Petitioners next highlight that indigent defendants have access to jailhouse briefs of other inmates. Pet'rs Br. at 36. Again, this Court previously has rejected similar arguments promoting second-hand justice for indigents. In *Penson v. Ohio*, 488 U.S. 75 (1988), for example, the Court rejected Ohio's argument that a defendant who received no appellate counsel was adequately protected by briefs filed by co-defendants: "One party's right to representation on appeal is not satisfied by simply relying on representation provided to another party . . . . A criminal appellant is entitled to a single-minded advocacy for which the mere possibility of a coincidence of interest with a represented codefendant is an inadequate proxy." *Id.* at 86-87.

Finally, Petitioners resort to the "nontechnical and easily understood" three-page form Application for appeal discussed above. Pet'rs Br. at 37. While short and very much unlike a lawyerly submission, the form still requires the indigent to argue the law and cope with an intricate procedural system—a task the average layperson, much less a functionally illiterate person, is ill-equipped to do.

II. THE COMPLEXITY OF APPEAL AND INDIGENT DEFENDANTS' CHARACTERISTICS REQUIRE THIRD-PARTY STANDING TO PROTECT INDIGENTS' CONSTITUTIONAL RIGHT TO COUNSEL

The same barriers that render an indigent defendant's *pro se* direct appeal meaningless likewise necessitate the protection of the right to counsel through third-party standing. As Respondents clearly demonstrate, third-party standing does not demand a showing that it is *impossible* for indigent defendants in Michigan to assert their own rights. Rather, this Court has required only the existence of a "genuine obstacle" to the third-party's assertion of his own rights. *Singleton v. Wulff*, 428 U.S. 106, 116 (1976) (plurality opinion). The "obstacle" need not be "insurmountable," but must present an impediment to the assertion of the constitutional rights at issue. *See id.* at 117; *accord Miller v. Albright*, 523 U.S. 420, 450 (1998) (O'Connor, J., concurring) ("[W]here a hindrance impedes the assertion of a claim, the right likely will not be asserted—and thus the relevant law will not be enforced—unless the Court recognizes third-party standing.").

In the unique circumstances of this case, however, the obstacles to an indigent defendant's ability to protect his own rights truly are insurmountable. This case is unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting their right to counsel. Moreover, the situation is atypical because an indigent defendant's primary recourse lies in federal habeas corpus review. Specifically, as the Sixth Circuit recognized below, the Michigan Supreme Court's decision in *Bulger* forecloses any relief on the constitutional challenge raised here in state court proceedings. *See* Pet. App. 14a (concluding that in light of *Bulger*, "the defendant would lose in this [direct appeal] proceeding, for Michigan will be bound by its precedent."). Thus, the vindication of a Michigan indigent defendant's

constitutional right lies primarily in collateral federal habeas corpus proceedings, which make the tangled process of direct review seem simple.

A. The Procedural Hazards of Federal Habeas Corpus

A 1995 study funded by the Justice Department found that 63% of federal habeas corpus petitions are dismissed without reaching the merits. *See* Roger A. Hanson & Henry W. K. Daley, U.S. Dep't of Justice, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 17 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf [hereinafter *Federal Habeas Corpus Review*]. Of that number, 3 out of 4 were dismissed on procedural grounds. *Id.* A brief overview of some of the procedural hazards of modern habeas corpus practice illustrates why this is the case.

To properly bring a federal habeas corpus petition, the indigent defendant first must exhaust available state remedies. *See* 28 U.S.C. § 2254(b)(1)(A) (2004). The exhaustion doctrine has been described as "a trap for the uneducated and indigent pro se prisoner-applicant," and "one of the most difficult procedural obstacles" to overcome.[16] Under Michigan's system, exhaustion requires the indigent defendant to file a post-conviction motion with the trial court under MCR 6.502. This motion must establish that the issue was raised in the direct appellate proceedings. *See* MCR 6.508(D)(3). Thus, for the indigent defendant who fails to raise the issue in his *pro se* Application for appeal, the potential for successful federal habeas corpus review likely ends here.

[16] Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. Rev. L. & Soc. Change 451, 489-90 (1991) (citations omitted).

The post-conviction motion also must identify all grounds for relief with specificity. Although Michigan provides a form motion for post-conviction proceedings,[17] the form fails to indicate the requisite level of specificity necessary to present a federal claim properly to the state court, and thereby preserve it for federal habeas corpus review. The four-page form simply tells the defendant to identify "the legal grounds for the relief you want."[18] As this Court recently held, however, a federal habeas corpus petitioner's state court post-conviction motion must clearly identify the federal nature of his claim. *Baldwin v. Reese*, 124 S. Ct. 1347, 1351 (2004). It is not enough that a substantively identical state law claim was made. *Id.* Rather, the indigent defendant must clearly label the claim "federal" in order to satisfy the exhaustion requirement. *Id.*

Even if properly presented, under *Bulger* the state trial court will deny an indigent defendant's post-conviction motion asserting his right to appellate counsel. The indigent defendant then must file an application for leave to appeal this denial to both the Michigan Court of Appeal and the Michigan Supreme Court, each time raising with specificity the "federal" nature of his claim. *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990); *see also* MCR 6.509; MCR 7.205.

Failure to assert his constitutional claim at any *one* of these steps can result in dismissal by the federal district court. *See* 28 U.S.C. § 2254(b)(1)(A) (codifying traditional exhaustion requirement); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims."). Indeed, if the indigent defendant raises multiple

[17] This form is available at http://courts.michigan.gov/scao/courtforms/felonycriminal/cc257a.pdf (last visited June 1, 2004).

[18] *Id.*

issues, some of which were not properly presented in the state courts, the entire petition must be dismissed. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) (discussing mixed-petition doctrine). Additionally, a separate doctrine—the procedural default doctrine—bars federal habeas consideration of a claim where the state court declines to address the defendant's federal constitutional claim based on the indigent's failure to comply with state procedural requirements. *See Coleman*, 501 U.S. at 729.

Few petitioners successfully complete the state post-conviction process. Over half (57%) of federal habeas petitions are dismissed for failure to exhaust state remedies, and another 12% for procedural default. *Federal Habeas Corpus Review*, *supra*, at 17. Other petitioners are released from prison before finishing state post-conviction review, which on average takes several years to complete. *See id.* at 12 ("Individuals with relatively short sentences are often out of prison before they can arrive at the Federal habeas doorstep."). And these unsuccessful federal habeas corpus seekers differ in one critical respect from the Michigan defendants denied counsel under MCL § 770.3a: these petitioners had appellate counsel identify federal issues and craft an appellate brief on the first direct appeal that could then be used to assist in raising issues in collateral proceedings. *Cf. Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) ("In *Ross*, we concluded that the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts that possess a discretionary power of review. We think that the same conclusion necessarily obtains with respect to postconviction review."). Even if the indigent defendant makes it to the federal courthouse door, however, that alone does not guarantee that his right to counsel claim will be protected.

B. Meeting Substantive Habeas Corpus Criteria

Even assuming the indigent defendant's petition is one of the few considered on the merits, the district court likely will deny the petition. Only 1% of federal habeas corpus petitions are granted on the merits and 1% remanded to state courts. *Federal Habeas Corpus Review*, *supra*, at 17. That is likely the case in part because a federal court evaluating an application for habeas corpus relief does not simply review whether the state court issued a correct decision. Rather, a federal court grants a writ of habeas corpus only where the state court's resolution of a constitutional question was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A federal court may grant a writ of habeas corpus as "contrary to" clearly established federal law only where the state court decision was "opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Alternatively, the federal court can analyze the indigent defendant's claim under the "unreasonable application" standard, which asks "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411; *accord Yarborough v. Alvarado*, No. 02-1684, 2004 WL 1190042, at *10 (U.S. June 1, 2004). This standard, combined with the procedural requirements, confirms the Sixth Circuit's conclusion that obtaining habeas corpus relief under the circumstances of this case is "virtually impossible." Pet. App. 15a.

Should a single defendant prevail in a federal district court, Michigan state courts likely would not apply that individual's favorable determination to any other defendant, due to the conflict with *Bulger*. *See Abela v. Gen. Motors Corp.*, 677 N.W.2d 325, 327 (Mich. 2004) (lower federal court decisions are not binding on state courts); *see also Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991) (collecting cases and literature expressing view that lower federal court decisions on questions of federal law do not bind the state courts).

In the end, while there always will be those rare and exceptional individuals who defy the odds and overcome the seemingly impossible obstacles to presenting a constitutional claim, the reality is that defendants who fall under MCL § 770.3a are the least likely to be able to protect their constitutional rights. Petitioners' request that the Court wait the years it could take for one of these individuals to appear should be rejected. *See Miller*, 523 U.S. at 474 (Breyer, J., dissenting) ("[F]orgo[ing] consideration of the constitutional merits to await another party's identical claim would foster repetitive and time-consuming litigation under the guise of caution and prudence.") (citation omitted).

III. MICHIGAN'S DEPRIVATION OF COUNSEL TO INDIGENT APPELLANTS VIOLATES CONSTITUTIONAL PRINCIPLES INDEPENDENT FROM THOSE UNDERLYING *DOUGLAS*

As Respondents aptly have illustrated, Michigan's deprivation of appellate counsel under MCL § 770.3a violates both due process and equal protection under the Fourteenth Amendment. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Ross v. Moffitt*, 417 U.S. 600 (1974); *Douglas v. California*, 372 U.S. 353 (1963). Appeals following guilty pleas in Michigan are not truly "discretionary" and the Constitution would mandate the appointment of counsel even if they were. The Court need go no further than *Douglas* and its progeny to

affirm the Sixth Circuit's decision striking down the Michigan system as unconstitutional.

But putting aside *Douglas*, Michigan's scheme independently violates the Constitution. *First*, Michigan's initial appeal for plea-based convictions—regardless of whether it is labeled "discretionary" or of right—constitutes a "critical stage" of criminal proceedings covered by the right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Second*, MCL § 770.3a abrogates the traditional and deeply rooted practice of providing counsel to indigents on initial appeal, itself an independent violation of due process.

A. Michigan's First Appeal Is a "Critical Stage" Requiring Counsel Under *Gideon*

On March 18, 1963, this Court issued both *Gideon* and *Douglas*. *Gideon*, of course, held that the right to counsel under the Sixth Amendment is "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." *Gideon*, 372 U.S. at 340 (quotation omitted). For its part, *Douglas*—relying not on the Sixth Amendment, but on due process and equal protection—held that an indigent defendant must be provided counsel for a first appeal as of right. *Douglas*, 372 U.S. at 357-58.

In the forty years since, this Court further defined the parameters of *Gideon* and *Douglas*. Expanding on *Gideon*, this Court deemed the Sixth Amendment's right to counsel so fundamental that it applies not only at trial, but to "all critical stages of the criminal process." *Iowa v. Tovar*, 124 S. Ct. 1379 (2004). Critical stages include "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *see also Bell v. Cone*, 535 U.S. 685, 695-96 (2002) (critical stage "denote[s] a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused."). They are those stages involving "trial-like confrontations," such as where a defendant would need assis-

tance to confront either his adversary or a State's intricate procedural system. *See United States v. Ash*, 413 U.S. 300, 312 (1973). Accordingly, this Court has extended the right to counsel to steps in the criminal process that occur before and after trial, including sentencing. *See Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (arraignment is a critical stage); *United States v. Wade*, 388 U.S. 218, 237 (1967) (post-indictment line-up is a critical stage); *Mempa*, 389 U.S. at 137 (sentencing is a critical stage); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (sentencing is a critical stage) (plurality opinion).

Because every jurisdiction in the United States has provided counsel on first appeal under *Douglas*, this Court has never had to address whether an appeal like Michigan's initial appeal for plea-based convictions is a "critical stage" covered by *Gideon*. Where the *Gideon* and *Douglas* line of cases have intersected, however, this Court effectively has concluded that a first appeal on the merits, like Michigan's, is a critical stage. Specifically, in *Evitts v. Lucey*, this Court determined that the right to effective assistance of counsel under the Sixth Amendment—traditionally applied only to "critical stages"—applies to a defendant's first appeal of right. 469 U.S. 387, 396 (1985). Later in *Penson v. Ohio*, 488 U.S. 75 (1988), this Court applied the critical stage "presumption of prejudice" standard for ineffective assistance of counsel to defendants denied counsel on a first appeal:

> [T]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial . . . . Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, the presumption of prejudice must extend as well to the denial of counsel on appeal.

Id. at 88 (citations omitted); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (quoting same).

These decisions compel the conclusion that, regardless of how it is labeled—whether "discretionary," of right, or some other type of appeal—the first appeal following a guilty plea in Michigan is a "critical stage" requiring the appointment of counsel. *First*, the initial appeal of a guilty plea in Michigan is a step "where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134. In *Mempa*, for instance, this Court deemed sentencing a critical stage because the absence of counsel could result in the waiver of appellate rights. *Id.* at 135 ("Even more important in a case such as this is the fact that certain legal rights may be lost if not exercised at this stage."); *see also Hamilton*, 368 U.S. at 54 (arraignment is critical stage because without counsel rights may be waived). Such risks already have come to fruition under Michigan's system. In *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), the Michigan Supreme Court summarily denied review of a case involving the State's purported failure to provide an indigent defendant a transcript to assist his *pro se* appeal. In her concurrence, Justice Corrigan justified the denial on the ground that the transcript issue had been waived because the indigent defendant failed to raise the error in his *pro se* Application for appeal. *See id.* at 687 (Corrigan, J., concurring). In her dissent, however, Justice Kelly cogently recognized that the case illustrated a fundamental flaw in Michigan's system:

> The concurrence points out that defendant failed to raise the issue in his application to the Court of Appeals. Defendant, untrained in law, may have been unaware of the consequences of failing to raise it. If so, this case illustrates why indigent defendants need the assistance of appointed appellate counsel, even when they have pleaded guilty. There is a distinct possibility that defendant was wrongly sentenced in this case. He is being denied a reasonable hearing because, lacking legal counsel, he did not follow the procedural requirements of appellate review.

Id. at 688 (Kelly, J., dissenting).

Second, aside from waiver, other substantial rights are affected on an initial guilty plea appeal in Michigan. Unlike truly "discretionary" second-tier appeals or collateral proceedings,[19] the initial appeal following a guilty plea is the first and only appeal aimed at correcting errors. Just as providing assistance of counsel at sentencing proceedings protects the improper imposition of a sentence, Michigan's initial appeal protects defendants from inevitable sentencing errors under the Michigan Sentencing Guidelines. *See Mempa*, 389 U.S. at 134-36. As for errors other than those related to sentencing, "[w]hile ordinarily appeals from a plea of guilty are less frequent than those following a trial on the merits, the incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as de minimis." *Id.* at 136.

Third, the first appeal following a guilty plea is a "critical stage" because it requires a defendant to confront a State's intricate procedural system. *See Ash*, 413 U.S. at 311. As reflected above, Michigan's procedures for guilty plea appeals are no less formidable than appellate procedures following trial. Just because the appeal follows a guilty plea, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to the

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[19] *See Ross v. Moffitt*, 417 U.S. at 615 ("We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been 'a correct adjudication of guilt' in every individual case, but rather whether 'the subject matter of the appeal has significant public interest' . . . . The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect.") (citations omitted); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited . . . .").

appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over." *Penson*, 488 U.S. at 85.

To be sure, as Petitioners take pains to highlight, this Court has not yet recognized a Constitutional right to appeal. *See* Pet'rs Br. at 10, 27-29; *see also* Judge Kolenda Br. at 1, 17. And it is true that this Court also has never had occasion or need to address whether a first appeal (whether of right or otherwise) is a "critical stage" under *Gideon*, and in other contexts has stated that the right to counsel on appeal is generally covered by the Fourteenth, as opposed to Sixth Amendment. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 160 (2000).

As a threshold matter, however, the critical stage analysis applies the right to counsel based upon the significance of the proceeding, not upon whether an accused has a right to the proceeding in the first instance. So, for example, an accused has a right to counsel at a preliminary hearing, even though he has no right to a preliminary hearing; during a lineup, even though he has no right to appear in a lineup; during a guilty or no contest plea proceeding, even though he has no right to plead guilty or no contest.

As for the constitutional underpinnings of the critical stage doctrine, because of uniform adherence to *Douglas*, this Court has never had need to apply the "critical stage" analysis under the Fourteenth Amendment. But the critical stage analysis—or something akin to it—is the analytical framework with which the Court has applied the right to counsel on appeal under the Fourteenth Amendment. In *Douglas*, the Court "undertook an examination of whether an indigent's access to the appellate system was adequate." *Ross*, 417 U.S. at 607. Based on that examination of the process involved in an appeal, the Court in *Douglas* found that facing the

California appellate "gantlet" without counsel "does not comport with fair procedure." *Douglas*, 372 U.S. at 357. Fair process at the appellate stage is also the centerpiece of the Court's decisions in *Penson v. Ohio*, 488 U.S. at 84 and *Anders v. California*, 386 U.S. 738, 744 (1967) (noting "constitutional requirement of substantial equality and fair process can only be attained where [appellate] counsel acts in the role of an active advocate").

Regardless, nothing prevents the application of the doctrine under *Gideon* and the Sixth Amendment here. This Court repeatedly has recognized that the "critical stage" doctrine warrants the expansion of the right to counsel under the Sixth Amendment "when new contexts appear presenting the same dangers that gave birth to the right [to counsel] itself." *Ash*, 413 U.S. at 311; *see also Wade*, 388 U.S. at 224-26. Michigan's appeals of plea-based convictions are one of those new contexts. Thus, even if Michigan's unprecedented denial of appellate counsel for indigent defendants who plead guilty can be said to evade the dictate of *Douglas* (which it does not), the deprivation of counsel runs afoul of the Constitution.[20]

B. Michigan's Scheme Unconstitutionally Abrogates a Traditional, Firmly Rooted Practice of Providing Indigents Counsel In Their First Appeal On the Merits

Citing *Smith v. Robbins*, 528 U.S. 259 (2000), Petitioners argue that the denial of counsel to those who plead guilty is permissible because Michigan is free "to experiment with

[20] Implicitly conceding the constitutional frailty of the Michigan scheme, Judge Kolenda and the amici States argue that the statutory denial of counsel should be excused because state law requires each defendant to waive the right to counsel for this critical stage. Judge Kolenda Br. at 17-20; State Amici Br. at 15-20. As Respondents and Amicus NLADA explain, this waiver justification itself violates the Fourteenth Amendment because the purported "waiver" applies only to the poor.

procedures for handling criminal appeals." Pet'rs Br. at 46; *see also* Judge Kolenda Br. at 20. In *Smith*, the Court recognized that an exception to the right to counsel under *Douglas* exists where appointed counsel, after carefully reviewing the record and examining the law, determines that any appeal would be frivolous. *Smith*, 528 U.S. at 264. This Court held that the states are free to adopt different procedures concerning counsel's ability to decline to pursue a frivolous appeal so long as the procedures adequately safeguard a defendant's right to counsel. *Id.* at 277-78. The Court in *Smith*, however, noted that there is a difference between procedures that protect the *effectiveness* of counsel versus those that deny counsel in the first instance. *Id.* at 286. Michigan's system does the latter, denying counsel outright. *Cf. Douglas*, 372 U.S. at 357 ("When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.").

In any event, even when viewed purely as a procedural issue, the "procedure" under MCL § 770.3a violates due process. In recent years, this Court has recognized that departures from traditional procedures—those derived from the common law or otherwise deeply rooted in our traditions and conscience—may independently violate due process. Such departures violate due process if the change "offends a principle of justice that is deeply rooted in the traditions or conscious of our people." *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (citation omitted); *accord Medina v. California*, 505 U.S. 437, 445 (1992).

To determine whether a state's procedures offend a deeply rooted practice, this Court has compared the practice not only with those employed at common law, *Medina*, 505 U.S. at 445-46, but also modern practice. *See Cooper*, 517 U.S. at

360. These and other cases[21] reflect the constitutional infirmity of Petitioners' attempt to depart from what has been considered black-letter law since *Gideon* and *Douglas*.

Thus, even when viewed as a purely procedural issue, Michigan's departure from the traditional protections afforded indigent defendants cannot stand. No jurisdiction in modern history—not one—has deprived an indigent defendant the appointment of counsel on first appeal on the merits, even when the state employs a true "discretionary" first appeal. *See Bundy v. Wilson*, 815 F.2d 125, 136-42 (1st Cir. 1987) (describing appellate systems in all U.S. jurisdictions); *Tesmer*, Pet. App. 28a-29a & n.2 (noting that only three states do not allow a first appeal of right and all require appointment of counsel for the first appeal). Indeed, a Michigan federal court explicitly rejected the notion that a so-called "discretionary" appeal permits the deprivation of counsel. *Mata v. Egeler*, 383 F. Supp. 1091, 1093-94 (E.D. Mich. 1974). Courts, scholars, and defendants assume that from the initiation of charges through the first appeal "lawyers in criminal courts are necessities, not luxuries." *Gideon*, 372 U.S. at 344. Accordingly, completely independent of the Due Process and Equal Protection guarantees in *Douglas*, or the Sixth Amendment protections of *Gideon*, Michigan's scheme violates the Constitution.

CONCLUSION

For the foregoing reasons, this Court should affirm the Sixth Circuit's decision striking down MCL § 770.3a and the practice of denying counsel to indigent defendants who plead guilty.

[21] *Cf. Dickerson v. United States*, 530 U.S. 428, 443 (2000) (departure from precedent unwarranted because Miranda warnings have become part of "our national culture").

Respectfully submitted,

STEVEN D. BENJAMIN
Co-Chair, Indigent Defense Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
BENJAMIN & DESPORTES, P.C.
P.O. Box 2464
Richmond, VA 23218
(804) 788-4444
Counsel for National Association of Criminal Defense Lawyers

PAUL M. RASHKIND
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
150 West Flagler St., Suite 1500
Miami, FL 33130
(305) 536-6900
Counsel for National Association of Federal Defenders

CRAIG A. STEWART
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022
(212) 715-1000

ANTHONY J. FRANZE *
SHEILA B. SCHEUERMAN
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
Counsel for National Association of Criminal Defense Lawyers

* Counsel of Record